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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/663,487	09/16/2003	Joseph P. Errico	F-293	2429
530 7590 05/29/2008 LERNER, DAVID, LITTENBERG, KRUMHOLZ & MENTLIK 600 SOUTH AVENUE WEST WESTFIELD, NJ 07090				
EXAMINER PELLEGRINO, BRIAN E				
ART UNIT		PAPER NUMBER		
3738				
MAIL DATE		DELIVERY MODE		
05/29/2008		PAPER		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

### Office Action Summary

**Application No.**

10/663,487

**Applicant(s)**

ERRICO ET AL.

**Examiner**

Brian E. Pellegrino

**Art Unit**

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 22 January 2008.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-19 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-19 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-946)
- 3) ☐ Information Disclosure Statement(s) (PTO/SG/US)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

## DETAILED ACTION

### *Claim Rejections - 35 USC § 103*

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1-19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gill et al. (6113637) in view of McGahan et al. (WO 01/62191). Gill et al. disclose (Fig. 1a) a spinal implant with two baseplates (**22,24**) that articulate. Gill also shows (Figs. 15a,15b) a manipulation tool to deliver the implant to the spinal space with the distal end including a wedge-shaped extension **79**. It can be seen (Figs. 11,12) that the baseplates include recessed corners (**40,62**). Fig. 17 shows the manipulation tool engages the recessed corners. However, Gill et al. fail to disclose the corresponding implant surfaces and tool engaging surfaces as being angled. It is noted in Fig. 14b that Gill shows the corresponding surfaces match. McGahan et al. illustrates (Fig. 15b) a spinal orthopedic set with a spinal implant **10** with angled perimeter surfaces having a central flat surface **22** flanked by two flat corner perimeter surfaces **18, 26** that correspond to the angled distal end of the tool having central surface **128** and two flanked flat surfaces **126, 130** to engage the implant. McGahan teaches that angled perimeter flat surfaces are provided to prevent rotation of the implant when inserting with the tool, page 12, lines 21-24. McGahan shows (Figs. 10,13,20a,21a,26) a wedge-shaped extension projection from the distal end of the manipulation tool. Regarding claims 9,10,17,18 please note the intended use as set forth in the claims carries no weight in the absence of any distinguishing structure. It would have been obvious to

one of ordinary skill in the art to modify the corresponding surfaces of the baseplate's perimeter and tool's distal end to be angled as taught by McGahan et al. with the Gill implant system such that it prevents any sliding motion that may occur so the baseplate will not slip or move off the tool when inserting.

### ***Response to Arguments***

Applicant's arguments filed 1/22/08 have been fully considered but they are not persuasive. Applicants argue that both references to McGahan and Gill do not have "wedge-shaped extensions". The Examiner respectfully disagrees since first, Gill clearly illustrates the manipulation tool is inserted within recesses and even element **79** which also can be considered a "wedge" since it is placed between the baseplates, see Fig. 17. McGahan teaches a tool with angled sections, such that sections of the distal end of the tool could each be considered wedges in addition to the central extension that also protrudes out of the tool to engage the implant. The Examiner would like to clarify to Applicants the rejection above since it is not clear if the rejection was understood. Thus, the only modification of Gill is to angle the surfaces of the part of the tool that engages the upper and lower baseplates and to modify the perimeter of the baseplates to be angled to match that of the tool. Gill already has a wedge extension and thus the only modification is to just change the contour of the perimeter of the baseplates with the corresponding surfaces of the tool to be angled and would only involve routine skill in the art. The change would not affect the function of the implant in the patient.

***Conclusion***

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Brian E. Pellegrino whose telephone number is 571-272-4756. The examiner can normally be reached on M- F (9am-5:30pm).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Corrine McDermott can be reached on 571-272-4754. The fax phone

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number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

TC 3700  
/Brian E Pellegrino/  
Primary Examiner, Art Unit 3738